

PUBLIC

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of)
PHOEBE PUTNEY HEALTH)
SYSTEM, INC., and)
PHOEBE PUTNEY MEMORIAL)
HOSPITAL, INC., and) DOCKET NO. 9348
PHOEBE NORTH, INC., and)
HCA INC., and)
PALMYRA PARK HOSPITAL, INC., and)
HOSPITAL AUTHORITY OF,)
ALBANY-DOUGHERTY COUNTY,)
Respondents.)

ORDER CERTIFYING UNOPPOSED MOTION FOR TEMPORARY STAY

I.

On October 21, 2014, pursuant to Rule 3.22 of the Commission's Rules of Practice, Respondents filed an Unopposed Motion for Temporary Stay ("Motion"). Respondents request a stay pending a final decision by the Georgia Department of Community Health ("DCH") on whether Georgia's Certificate of Need ("CON") laws would effectively preclude the Commission's preferred remedy. Also on October 21, 2014, Federal Trade Commission ("FTC") Complaint Counsel filed a Memorandum Relating to Respondents' Unopposed Motion for Temporary Stay ("Memorandum"). For the reasons set forth below, the Motion is certified to the Commission, with the recommendation that the unopposed request for a temporary stay be granted.

II.

The relevant procedural background, as stated in the Motion and Memorandum, is as follows: On June 24, 2013, the Commission withdrew this matter from adjudication to consider a consent agreement. On August 22, 2013, the Commission publicly announced that it had

entered into a consent agreement, subject to a 30-day notice and comment period. In its August 22, 2013 Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment, the Commission stated that “Georgia’s CON statutes and regulations effectively prevent the Commission from effectuating a divestiture of either hospital in this case.” Analysis to Aid Public Comment (Aug. 22, 2013) at 4.

In the proceeding before the Georgia DCH, DCH staff issued an initial determination letter on June 3, 2014, stating among other things, that “returning Phoebe North to its status as a separately licensed . . . hospital for divestiture would not require prior CON review and approval.” (Exhibit 8 to Respondents’ Motion).

In a statement dated September 4, 2014, the Commission announced that it was withdrawing its acceptance of the proposed Consent Agreement and was returning the matter to adjudication. Statement of the Commission (Sept. 4, 2014). The Commission stated that it had originally accepted the proposed Consent Agreement “in light of the apparent unavailability of a practical and meaningful structural remedy,” but that its understanding was now different because the Commission had become “aware that the CON laws might not bar a structural remedy in this matter.” *Id.* at 2. Citing the June 3, 2014 initial determination letter, the Commission wrote: “[t]hat initial determination is currently on appeal, but we believe that Georgia CON laws may not be an impediment to structural relief.” *Id.*

The Commission also issued an Order, dated September 4, 2014, that returned this matter to administrative litigation and scheduled the evidentiary hearing to begin on February 4, 2015. Pursuant to a Revised Scheduling Order, the parties issued renewed discovery requests and the close of fact discovery is November 17, 2014.

In the proceeding before the Georgia DCH, Respondents appealed the June 3, 2014 initial determination letter. On October 2, 2014, the DCH hearing officer issued a written decision that overturned the initial determination letter. Respondents state that in approximately 50 days, there will likely be a final agency decision.

III.

Respondents assert that the DCH decision will determine a critical issue in this Part III proceeding, that the proceedings before the DCH have a defined deadline, and that the outcome of such proceedings will give both parties effective certainty about the status of the Georgia CON laws and the ultimate availability of divestiture. Respondents argue that there is good cause for the Commission to stay this proceeding and that doing so is consistent with the Commission’s prior decisions in this case. Respondents further argue that issuing a stay will not prejudice any party, as Respondents will continue to operate the hospital according to the Stipulated Preliminary Injunction entered by the federal court and the status quo will be maintained. Lastly, Respondents contend that continued litigation will cost Respondents and nonparties significant resources in complying with discovery requests and preparing for a trial that may never need to happen.

Complaint Counsel states that, in light of the posture of the concurrent DCH proceeding and additional commitments made by Respondents, Complaint Counsel has agreed to not oppose Respondents’ motion for two reasons. First, Complaint Counsel states it believes that its case

would not be prejudiced by a limited stay of the administrative proceedings. Second, Complaint Counsel states that it is mindful that nonparties have expressed concern that the parties' discovery requests impose significant burdens, which the nonparties view as particularly burdensome in light of their uncertainty as to the availability of relief in this proceeding.

IV.

Respondents filed their Motion pursuant to Commission Rule 3.22, which provides that certain motions not applicable here shall be ruled on by the Commission, all other motions shall be ruled on by the Administrative Law Judge, if within his authority, and the Administrative Law Judge shall certify to the Commission any other motion upon which he has no authority to rule. 16 C.F.R. § 3.22(a). Rule 3.22 further provides that a motion under consideration by the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission so orders. 16 C.F.R. § 3.22(b).

Because the Commission has previously issued a stay in this case and because a stay issued by the Commission will provide the requested relief in its entirety, the Motion is hereby certified to the Commission for ruling pursuant to Commission Rule 3.22(a). This certification further recommends that the Commission find good cause to grant a stay of this proceeding, and that such stay be granted pending a final ruling by the Georgia DCH. As the Commission has recognized, the availability of relief depends on Georgia CON law, as applied by the Georgia authorities. Analysis to Aid Public Comment (Aug. 22, 2013) at 4. Issuing a stay in this matter will not prejudice any party. Complaint Counsel acknowledges that it will still be able to pursue effective relief because the duration of the stay is short and a number of protections are in place, including the injunction imposed by the district court. In addition, a temporary stay would address the concerns articulated by nonparties as to the burden imposed by the parties' subpoenas.¹ Absent a stay, ongoing discovery and preparation for the administrative trial by all parties will be required.

V.

For all the foregoing reasons, the Unopposed Motion to Stay Proceedings is hereby certified to the Commission, with the recommendation that the Commission stay this proceeding pending a final ruling by the Georgia DCH.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: October 22, 2014

¹ On October 14, and October 16, 2014, two nonparties filed motions to quash or limit subpoenas served on them by the parties. Various other nonparties have been granted extensions to the deadlines for filing motions to quash or limit subpoenas by orders dated October 14, October 15, and October 21, 2014.